IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1982

No. 82-945

SURE-TAN, INC., AND SURAK LEATHER COMPANY,

Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

AND

AMICUS CURIAE BRIEF OF CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD IN SUPPORT OF RESPONDENT

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The California Agricultural Labor Relations Board respectfully moves this Court for leave to file the accompanying brief in this case as amicus curiae. The consent of respondent National Labor Relations Board has been obtained, but Petitioners Sure-Tan Inc. and Surak Leather Company refused to consent to the filing of a brief by the California Agricultural Labor Relations Board as amicus curiae.

STATEMENT OF INTEREST

The California Agricultural Labor Relations Board (ALRB) is an independent State agency which was created in 1975 to administer a newly-enacted statute governing relations between agricultural employees, labor unions, and agricultural employers in the State of California. This statute, the Agricultural Labor Relations Act (ALRA or Act),[1] came into being at a time when agricultural labor disputes had created unstable and potentially violent conditions in the State and were a threat to California's agricultural economy.

The purpose and object of the ALRA is to ensure peace in the fields by guaranteeing justice for all agricultural workers and stability in agricultural labor relations. The Act seeks to achieve these ends by providing orderly processes for protecting, implementing, and enforcing the respective rights and responsibilities of employees, employers, and labor organizations in their relations with one another. The overall job of the ALRB

[1] The ALRA is found at California Labor Code sections 1140 et seq.

is to achieve this goal through administration, interpretation, and enforcement of the ALRA. The Act is modeled after the National Labor Relations Act (NLRA), 29 U.S.C. sec. 151 et seq., and the Legislature directed the ALRB to follow applicable NLRA precedent in administering the ALRA.[2]

Like its NLRB counterpart, Amicus ALRB has two principal functions: (1) to determine and implement the free democratic choice of employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union; and (2) to prevent and remedy unlawful acts and conduct, i.e., unfair labor practices, by either employers or unions.

In the course of its eight-year history, Amicus has often confronted the task of remedying unfair labor practices affecting undocumented workers.[3] Although precise statistics are not available, it is undisputed that undocumented workers make up a significant proportion of the California agricultural workforce.[4] This

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[2] See California Labor Code section 1148. Section 2(3) of the National Labor Relations Act (29 U.S.C. sec. 151, et seq.) specifically excludes farmworkers from its coverage.

[3] Although Petitioners and the Court below used the term "illegal aliens" to describe the discriminatees herein, Amicus prefers to refer to the discriminatees, as well as other similarly situated workers, as "undocumented workers", a term which accurately describes their situation and conforms to a United Nations resolution, joined by the United States, which directed the Secretary General to define those workers who illegally or surreptitiously enter another country to obtain work as "nondocumented migratory workers". (Salinas and Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis,* (1976) 13 Houston L. Rev. 863, fn. 1.) Amicus has employed the term "undocumented workers" in its own decisions. (E.g., *Mini Ranches Farms,* 7 ALRB No. 48 (1981).)

[4] Recent studies indicate that the workforce available to cultivate and harvest California's fruit and vegetable crops is increasingly comprised of undocumented workers. Some crops depend al-

is particularly true in the southern part of the State, which borders on Mexico. Amicus has also had direct experience with the difficult and exploitative conditions under which undocumented agricultural workers live in California. Amicus accordingly believes that it may be of assistance to this Court.

Additionally, Amicus has a two-fold interest in this proceeding. First, since the ALRB is required by statute to follow applicable NLRA precedent, the Court's decision in the instant proceeding may directly affect Amicus's ability to effectively enforce the ALRA. Additionally, Amicus wishes to point out that California may have an independent State interest in continuing to include undocumented workers within the reach of the ALRA in view of (1) the exclusion of agricultural workers from the protections of the NLRA; (2) the California Legislature's desire to extend similar protections to California agricultural workers; and (3) the large number of undocumented workers employed in California agriculture. Thus, even if it were to be determined that either the Court-ordered remedies or the NLRB's remedies in this case impermissibly conflict with the policies of the Immigration and Nationality Act (INA), 8 U.S.C. sec. 1101 et seq., such a determination need not be so expan-

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most entirely on a flow of undocumented workers from Mexico. For example, in San Diego County, the 5,000 laborers in the pole tomato crop are nearly all undocumented; in the Monterey County strawberry crop, 80% of the 1,500 workers are undocumented; and in Tulare County, 60% of the 7,000 citrus workers are undocumented. (Mines and Martin, *Foreign Workers in Selected California Crops*, California Agriculture, March–April 1983.)

sive as to limit California's right to regulate employment relationships to protect undocumented agricultural workers within the State.

The issues raised by this case are not only important to the particular federal agencies involved, the Court's decision herein will have far-reaching implications for California and other States struggling to cope with the effects of a large undocumented population.

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This brief amicus curiae is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the Agricultural Labor Relations Board is set forth in that motion.

SUMMARY OF ARGUMENT

1. Petitioners' claimed conflict between the Immigration and Nationality Act (INA), 8 U.S.C. sec. 1101 et seq.) and the National Labor Relations Act (NLRA), 29 U.S.C. sec. 151 et seq., is based on a faulty premise, namely, that the only objective of Congress in enacting the INA was to protect American workers from an influx of foreign labor. The cases cited by Petitioners in support of that proposition involve the interpretation of section 212(a)(14) of the INA, (8 U.S.C. sec. 1182(a)(14), which provides for the labor certification process. The INA serves a broader function; the statute is, in fact, a comprehensive scheme for regulating immigration and naturalization. Once that is recognized, it is apparent that there is no conflict between the overall policies and purposes of the INA and those of the NLRA. Moreover, petitioners have failed to demonstrate that even those sections of the INA enacted by Congress to protect the domestic workforce conflict with the standard NLRA remedies, the purpose of which is also to protect American workers.

2. Extension of the protections of the NLRA to undocumented workers serves to protect the domestic workforce as well as undocumented workers themselves. Thus, protected, undocumented workers are free

to organize, either among themselves or with their "legal" co-workers, to improve wages and working conditions. Without those protections, undocumented workers—who often accept jobs on substandard terms—will be unable to even attempt to improve their working conditions through concerted action, a situation which will "seriously depress wage scales and working conditions of citizens and legally admitted aliens." (*De Canas* v. *Bica* 424 U.S. 351, 357, (1976).)

3. Petitioners' action in reporting its employees to the Immigration and Naturalization Service (INS) was not protected by the First Amendment right to petition the government for redress of grievances. Petitioners' conduct falls within the "sham" exception recognized by this Court in *Bill Johnson's Restaurants Inc.* v. *N.L.R.B.*, ___ U.S. ___, 103 S.Ct. 2161 (May 31, 1983) since their efforts to influence governmental action were neither genuine nor *bona fide*.

ARGUMENT

I

NLRB REINSTATEMENT AND BACKPAY ORDERS DO NOT CONFLICT WITH THE POLICIES OF THE INA; FURTHERMORE, UNFAIR LABOR PRACTICES AFFECTING UNDOCUMENTED WORKERS MUST BE FULLY REMEDIED IF NATIONAL LABOR POLICIES ARE TO BE EFFECTIVELY ENFORCED.

A. Petitioners Have Misidentified the Purposes of the INA, and Ignore The Policies and Purposes of The NLRA.

Petitioners Sure-Tan, Inc. and Surak Leather Company (Employer or Company) contend that the judgment and order of the Court of Appeals for the Seventh Circuit create a fundamental conflict between the NLRA and the INA. (Pet. 9.); Petitioners further suggest that even NLRB remedies which might provide for other, more limited relief for undocumented workers would also conflict with the INA.[1] (Pet. 12-13.) These arguments rest in part on the mistaken assertion that the only objective of Congress in enacting the INA was to protect American workers from an influx of foreign labor.

However, the cases cited by Petitioners in support of such a narrow interpretation all deal solely with various aspects of the process for *labor certification* under section 212(a)(14) of the INA.[2] (*See, Peskikoff* v. *Secretary of Labor,* 501 F.2d 757 (D.C. Cir. 1974) [Appeal from denial of labor certification for live-in maid]; *Wang* v. *Immigration & Naturalization Service,* 602 F.2d 211 (9th Cir. 1979) [Appeal from denial of exemption from labor certification requirements]; *Stenographic Mach.* v. *Re-*

[1] In this instance, as is customary, the NLRB deferred determination of the extent of Petitioners' backpay liability to subsequent compliance proceedings. (Pet. App. 63a; see, e.g., *N.L.R.B.* v. *Deena Artware* 361 U.S. 398 (1960).) The Court of Appeals determined, however, that the discriminatees were entitled to a minimum award of six months' backpay. Like the NLRB, Amicus ALRB routinely orders reinstatement and backpay as a remedy for discriminatory discharges without regard to the immigration status of the discriminatee.

[2] This section permits entry of foreign workers if the Secretary of Labor certifies both that there are no available, qualified domestic workers and that domestic wage rates will not be adversely affected thereby.

gional Admin'r Etc., 577 F.2d 521 (7th Cir. 1978) [Appeal from denial of applications for labor certification]; *Silva* v. *Secretary of Labor,* 518 F.2d 301 (1st Cir. 1975) [Appeal from denial of labor certification for live-in maid]; *Williams* v. *Usery,* 531 F.2d 305 (5th Cir. 1976) [Challenge to Secretary of Labor's failure to determine adverse effect of wage rate for imported sugar cane cutters].) While the purpose of that particular section is the protection of United States workers—both citizens and resident aliens—it does not necessarily follow that the primary purpose of the entire INA is to protect the domestic workforce from competition from foreign workers. For example, the INA does not make it a crime to hire undocumented workers—a proposal which has been urged as the most effective means of reducing employment of undocumented workers [3]. Nor do undocumented workers commit any crime by accepting employment. (*N.L.R.B.* v. *Sure-Tan,* 583 F.2d 355, 359 (7th Cir. 1978).) Congress did not enact the INA solely for the limited purpose of protecting the American workforce; rather, the INA provides a comprehensive scheme for the regulation of immigration and naturalization. (*De Canas,* v. *Bica, supra,* 424 U.S. 351, 359.)

Section 212(a)(14) of the INA, which provides for a labor certification process, offers one method, among several, for qualifying to enter into the United States;

[3] See e.g., Martin and Mines, *Immigration Reform and California Agriculture,* California Agriculture, January–February 1983, p. 14; Fogel, *Economic Aspects of Illegal Aliens,* (1977) 15 San Diego Law Review 63, 76–78.

under this section, entry is conditioned upon the petitioner's job skills and a corresponding lack of skills among available domestic workers. In contrast, other preference categories focus on familial relationships. (See e.g., 8 U.S.C. sec. 1143(a)(1), (2), (4), (5). The labor certification process presents a Congressional accommodation between the interests of employers and the interests of American workers. (*Peskikoff* v. *Secretary of Labor, supra,* 501 F.2d 757, 761.) It does not, however, represent an articulation of the overall Congressional purpose in enacting the INA. Indeed, this Court expressly recognized in *De Canas* v. *Bica, supra,* that the "central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. (424 U.S. at 359.)" [4]

[4] In *De Canas,* the Court refused to invalidate a California statute regulating employment of undocumented workers on the ground that the State statute was preempted by the INA. The Court characterized the statute's impact on immigration as "purely speculative and indirect" (424 U.S. at 355), and recognized that the States have an interest in regulating the employment relationship to protect workers within their boundaries.

The *De Canas* Court also recognized that the problem posed by large numbers of undocumented workers is particularly acute in California due to its proximity to Mexico. In determining that the INA had not preempted State action regulating the employment of undocumented workers, the Court looked to provisions of the Federal Farm Labor Contractor Registration Act (FFLCRA), 7 U.S.C. sec. 2041 *et seq.*, which specifically prohibit employment of undocumented workers by farm labor contractors. Those provisions of FFLCRA state that the Act intended to *supplement* State action in regulating undocumented workers. Both the exclusion of farmworkers from the NLRA, and this Court's interpretation of the FFLCRA in *De Canas,* suggest that California may retain the authority to include undocumented workers within the protections of the ALRA, including the authority to provide reinstatement and backpay for undocumented workers, notwithstanding any possible limitations on the NLRB's power to do so.

Once the INA is properly recognized as a comprehensive statutory scheme for regulating *immigration,* rather than one for regulating *employment* or *employment relations,* it is apparent that Petitioners' argument must fail. The NLRB does not seek to regulate either entry by, or naturalization of, undocumented workers; by ordering reinstatement and backpay for workers discriminatorily discharged due to their union activities, the national Board is enforcing national *labor* policies, the thrust of which are not at odds with policies underlying the nation's immigration laws.

Those labor policies are embodied in section 7 of the NLRA (29 U.S.C. sec. 157), which guarantees workers the right to self-organization; to form, join, or assist labor unions, to bargain collectively; and to engage in concerted activities for their mutual aid and protection.[5] When the Sure-Tan workers exercised the rights guaranteed them by section 7, and selected a union to represent them, the Company deliberately contrived their discharge by requesting an INS check on their status. The NLRB's response was predictable—having found the workers' discharge was precipitated by their union activity, the Board ordered the Company to restore the workers to their former positions and make them whole for the economic losses caused by the unlawful discharges.

This Court recognized the importance of reinstatement as a remedy for unlawful discharges in *Phelps*

[5] California Labor Code section 1152 corresponds to section 7 of the NLRA.

Dodge Corp. v. *N.L.R.B.*, 313 U.S. 177, 193–194 (1941), where reinstatement was described as, "the effective assurance of the right of self-organization." In attacking the NLRB's order herein, Petitioners seek to render the NLRB powerless to remedy by reinstatement conduct which Employer concedes was motivated by anti-union animus. Although Petitioners specifically challenge only the backpay and reinstatement order, their analysis, carried to its logical conclusion, would preclude *any* Board remedy for the unlawful conduct. Such a result would not be consistent with the intention of Congress, nor with the goal of stable labor relations underlying the NLRA.

Employer concedes that, in notifying the INS, it was motivated by anti-union animus. The NLRB concluded that, having initially benefited from the employment of undocumented workers, Employer could not then cause their deportation in order to rid itself of a pro-union workforce. To condone Petitioners' conduct would distort the purpose of the federal immigration laws, and effectively prevent the NLRB from remedying the effects of unlawful discharges in any industry where undocumented workers are employed. The NLRA, like the INA, embodies policies of national scope and importance. Acknowledgement of the importance of those national labor law policies presents no conflict; each may be accommodated by the other. As discussed *infra*, the Board's remedies in this case serve to effectuate both national labor law *and* immigration policies.

NLRB (and ALRB) decisions which provide for rein-

statement and backpay for wrongfully discharged undocumented workers simply reflect the real world, i.e., the presence in the workforce of a significant number of undocumented workers, usually concentrated in low-paid, marginal occupations.[6] Both the national Board and Amicus are confronted, not with the issue of whether the entry of these workers was legal, but with the question of how to remedy unlawful labor practices, once they have been committed, in order to effectuate the policies embodied in their respective Acts.[7] In addressing that question, the NLRB has concluded that the affected workers' immigration status is not determinative of their rights. This is a function of the Board's responsibility for shaping and enforcing labor relations policies; the Board simply does not bear the responsibility for implementing national immigration policy or for

[6] *See,* Gomez-Quinones, "Mexican Immigration to the United States and the Internationalization of Labor, 1848–1980: An Overview", Rios-Bustamante (ed.), *Mexican Immigrant Workers in the United States* (UCLA, 1981). The number of undocumented workers in the United States is estimated at between two and five million. Estimates vary considerably, as do the various methodologies for estimating. (See Cross and Sandos, *Across the Border: Rural Development in Mexico and Recent Migration to the United States* (U.Cal. 1981), pp. 81–84, summarizing various studies.)

[7] This Court explicitly recognized that, although "a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, [this] cannot negate the simple fact of his presence within the State's territorial perimeter. . . . And until he leaves the jurisdiction . . . he is entitled to the equal protection of the laws a State may choose to establish." (*Plyler* v. *Doe,* ___ U.S. ___, 102 S.Ct. 2382, 2394 (1982).) Under the Court's analysis in *Plyler* v. *Doe,* California may be required to provide the same protections to undocumented workers that it provides to all other workers under the ALRA.

acting directly to halt the flow of undocumented workers into the United States. The same is true for Amicus ALRB. Neither Board has the authority or expertise to enforce a statute administered by another agency. (*N.L.R.B.* v. *Apollo Tire Co. Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979); *Sure-Tan, Inc.* 246 NLRB 788 (1979) Order Denying Motion, Pet. App. 42a) The expertise of both the NLRB and Amicus ALRB lies in the area of labor relations; in this case, the NLRB utilized that expertise to effectuate the purposes of the NLRA. As demonstrated below, the NLRB's remedy in fact *accommodates* national immigration policies.

Were the Board to permit discriminatory discharges of undocumented workers, while prohibiting such treatment of other workers, the Board would actually *encourage* employment of undocumented workers as a means of defeating unionization. By redressing the commission of unfair labor practices without regard to the discriminatees' immigration status, the NLRB is, therefore, furthering the policies of section 212(a)(14) of the INA. (*N.L.R.B.* v. *Apollo Tire, supra,* 604 F.2d 1180, 1183; *N.L.R.B.* v. *Sure-Tan, Inc., supra,* 583 F.2d 355, 359.) [8]

[8] In a somewhat analogous situation, this Court upheld a Maryland statute which (1) prohibited producers of petroleum products from operating retail service stations within the State, and (2) required such producers to extend voluntary allowances to all service stations they supplied, despite the statute's anticompetitive effect. (*Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978).) The Court held that, although the statute conflicted with the central policy of the Sherman Act—favoring free competition—the statute was not preempted. In part, the Court's decision rested on its conclusion that a contrary result would effectively destroy the State's power to engage in economic regulation. In the instant case, even assuming, arguendo, that NLRB decisions to extend protections to undocumented workers conflict with INA regulation of the employment of aliens, a con-

Although Petitioners contend that an order of reinstatement and backpay will encourage undocumented workers to enter the United States to claim their rights, any effect that NLRB (or ALRB) remedies might have on immigration is, in the words of the *De Canas* Court, "purely speculative and indirect." The Seventh Circuit pointed out that, as a practical matter, it was "unlikely that a discriminatee would attempt to illegally enter the United States primarily to pursue his remedies and thus draw attention to his illegal alien status." (Pet. App. 18a.) The court correctly identified the more likely causes of migration from Mexico as being the economic and social attractions of the United States. Those attractions, together with the chronic unemployment, food shortages, and overpopulation in Mexico, draw the Mexican undocumented worker to the United States [9]. NLRB and ALRB remedies can be only an insignificant factor in the push-pull of complex economic factors—both in the United States and Mexico—which cause and contribute to migration to this country.

In *Southern S.S. Co.* v. *N.L.R.B.*, 316 U.S. 31, 47 (1941) —the principal case upon which the Company relies—this Court cautioned that the "entire scope of Congressional purposes calls for careful accommodation of one statutory scheme to another. . . ." [10]

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trary conclusion would severely hamper the effectiveness of the agency in enforcing its own statute. The same would be true, *a fortiori*, for Amicus ALRB.

[9] Salinas and Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, (1976) 13 Houston L. Rev. 863, pp. 808–809, and Cross and Sandos, op. cit. pp. 1–74.

[10] This case, unlike *Southern S.S. Co.* v. *N.L.R.B.*, *supra*, 316 U.S. 31, presents no direct conflict between the NLRB's remedy and another clearly articulated Congressional proscription. In *South-*

Petitioners, however, would utterly disregard the national labor policies embodied in the NLRA, and instead focus on the policy considerations underlying but one aspect of the INA, the labor certification process. What Employer urges is not an accommodation of the NLRA and the INA, but a wholesale disregard of Congressional purposes and policies in enacting the NLRA. But, even the labor certification process, as well as other provisions of the INA designed to protect the American workforce, must accommodate national labor policies, because denial of the protections of the National Labor Relations Act to undocumented workers detrimentally affects the entire workforce.

B. Denial of NLRA Protections to Undocumented Workers Would Harm The Entire Workforce.

The NLRB has long recognized that undocumented workers are entitled to the protections of the NLRA.[11] (See, e.g., *Cities Service Oil Co. of Pennsylvania,* 87 NLRB 324, 331 (1949); *Morris Seedmon, et al.,* 102 NLRB

ern Steamship, strikers were discharged for engaging in concerted activity protected by section 7 of the NLRA; however, their conduct was a clear violation of the anti-mutiny provision of the federal maritime statutes. The Court found that the NLRB's remedial order was therfore unenforceable. The NLRB's remedy herein does not raise any direct conflict with the provisions of the INA, since it is not a crime for an employer to employ an undocumented worker or for an undocumented worker to work.

[11] Petitioners' contention that the employees' illegal status *ipso facto* excludes them from the protections of the NLRA would seem to be answered by the fact that Congress has been very specific when it elects to exclude undocumented persons from coverage under federal acts. (See, e.g., 7 U.S.C. sec. 2015(f) and 7 C.F.R. sec. 273.4 (1982); 45 C.F.R. sec. 233.50 (1982); 42 U.S.C. sec. 1395(i)-2 and 42 C.F.R. sec. 405.205(b) (1982).) No such exclusion is found in the NLRA.

1492 (1953).) The only federal courts to have expressly considered the issue have agreed with the NLRB's conclusion. (*N.L.R.B.* v. *Sure-Tan, Inc.*, 583 F.2d 355 (7th Cir. 1978); *Apollo Tire Co.* v. *N.L.R.B.*, 604 F.2d 1180 (9th Cir. 1979).) The Ninth Circuit pointed out that Section 2(3) of the NLRA defines "employees" broadly, and provides specific exceptions to coverage of the Act, which exceptions do not include undocumented workers. (*N.L.R.B.* v. *Apollo Tire, supra,* 604 F.2d 1180, 1182.)

As both the Seventh and Ninth Circuits recognized, extension of the protections embodied in the NLRA to undocumented workers serves to protect the domestic workforce as well as the undocumented workers themselves. This Court noted in *De Canas* v. *Bica, supra,* 424 U.S. 351, 357, that "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens." [12] By protecting undocumented workers who organize—either among themselves or with their "legal" co-workers—to improve wages and working conditions, the NLRB pro-

[12] See also, Salinas and Torres, op. cit., pp. 876–881, Cross and Sandos, op. cit. pp. 84–96, and Fogel, op. cit., p. 66. The Salinas-Torres article points out that native workers often must accept low wages and substandard working conditions for fear of being replaced by undocumented workers, and that this is especially true along the Mexican border, where the proportion of undocumented workers is so high that the wages paid to them become the prevailing wage, adversely affecting the standard of living of the community at large. The authors note that the Texas cities of Brownsville, McAllen, and Laredo—all bordering Mexico—had, at the time their article was written, the lowest per capita income in the nation.

tects all workers. Were it to exclude undocumented workers from the protection of the NLRA, the Board would actually *encourage* employment of undocumented workers by those employers who wish to avoid dealing with a union. Excluding undocumented workers from the protections of federal (and State) labor laws would additionally encourage employer exploitation of these workers. The court below recognized that the "immigration laws have provided an employer with a powerful tool for unfair and oppressive treatment of migrant labor." (Pet. app. 15a.) Undocumented workers are so pressured to find employment that they will usually work long hours for less pay than their "legal" counterparts. Their fear of being deported and of losing their only source of income requires uncritical acceptance of employer demands.

Amicus ALRB observed in its own decision, *Giumarra Vineyards*, 7 ALRB No. 24, p. 36 (1981) that "undocumented workers are more susceptible to intimidation and coercion than other agricultural employees. Their peculiar vulnerability is easily exploitable . . ." Reference to just a few ALRB decisions attests to the truth of that observation, and illustrates the desperate conditions endured by undocumented agricultural workers in California.

In *Ukegawa Brothers*, 8 ALRB No. 90 (1982), the Administrative Law Judge (ALJ) found that the employer relied heavily on undocumented workers living in the brush surrounding the employer's cultivated fields. The ALJ conducted an on-site inspection of the employer's

operation, and described the living conditions she observed:

> . . . crude habitations were observed concealed in brush near the fields. Not tall enough to stand in, the structures consisted of pieces of cardboard and plastic strung in the brush, sometimes over rough wooden supports. Wood pallets and tomato boxes served as tables, seats, and beds. Were it not for the presence of firepits, trash in large quantities, and personal items such as clothing and pots, it would be difficult to believe these structures served as dwellings. Two stall showers were at one location, and at another site a man covered with lather was standing under a trickle of water from a drainage pipe. A catering truck (which the Employer permits to enter its fields) was observed stocked with toothpaste, razor blades and candles, as well as canned food items.

(8 ALRB No. 90, ALJ Decision, p. 8.)

The same sort of conditions prevailed among the workforce of Kawano, Inc., another San Diego County employer. In an ALRB proceeding involving that employer, a union organizer testified that at least some of the undocumented workers lived in the areas adjacent to Kawano's fields. He saw plastic lean-tos, pots, pans, and a makeshift fireplace; clothes were hanging out to dry. A catering truck entered the area after work hours, as did other vendors providing a variety of goods for the undocumented workers, who hesitated to leave the employer's isolated ranches for fear of detection. (*Kawano, Inc.*, 7 ALRB No. 16, ALJ Decision, pp. 57–58 (1981).)

Undocumented workers employed by Nagata Brothers Farms, also located in San Diego County, lived in

boxes and plastic tents, in the rows between the tomato vines, tents, or in caves at the edges of the fields. (*Nagata Brothers Farms,* 5 ALRB No. 39 ALJ Decision, pp. 7–9 (1979).)

In *Mini Ranch Farms,* 7 ALRB No. 48 (1981), the ALJ described the employer's treatment of its workforce, which was composed primarily of undocumented workers, in this way: The employees began work in late February and mid-March 1980. They were not paid any wages until April 7; between that date and May 9, they were paid $4,982.00, which was divided among 25 workers. During all this time, the workers were working seven days a week, eight to ten hours a day. The employer also provided food and lodging, although the money for food was deducted from their pay. At one point, the employer gave the workers $730.00 out of wages totaling $2995.89, telling them the balance had been paid to a local market for food. When employees protested about non-payment of wages, they were told to return to Mexico if they did not "like it". The employer directly discharged 11 workers who had protested working conditions; he told them police were in the area and that they would have to return to Mexico. He drove them to an almond grove, and left them to make their way to the border as best they could. (*Id.* at pp. 3–6.)

Amicus has found that wages—as well as working and living conditions—of all agricultural workers are affected by the presence of undocumented workers. Undocumented workers are frequently paid less than "legals." For example, Ukegawa Brothers paid their undocu-

mented workers from $.25 to $.90 an hour less than documented workers. (*Ukegawa Brothers, supra,* 8 ALRB No. 9, ALJ Decision, p. 8.) Kawano, Inc. also paid its undocumented workers $.40 an hour less than its documented workers (*Kawano, Inc.,* 4 ALRB No. 104 (1978), ALJD, p. 52 enf'd. *Kawano, Inc.* v. *Agricultural Labor Relations Bd.* 106 Cal.App.3d 937 (1980).) Extensive use of undocumented workers at these lower wage rates produces depressed area wage scales. (See *ante,* footnote 11.)

These examples illustrate the working and living conditions that undocumented workers are willing to accept. And, agricultural employers have demonstrated a corresponding willingness to utilize—and exploit—undocumented workers. California agricultural employers already employ significant numbers of undocumented workers; indeed, in some crops, the workforce is composed almost entirely of undocumented workers. (See Statement of Interest, p. 3, in accompanying Motion for Leave to File Amicus Curiae Brief.) The availability of this large pool of cheap labor has not only directly affected wages and working conditions of "legal" California farmworkers, it has also reduced job opportunities for the domestic workforce. For example, in 1976, Kawano hired 426 undocumented agricultural workers and only 25 "legal" workers; this reversed an earlier trend when Kawano hired a balanced ratio from the two groups. The change in hiring practices occurred after the passage of the ALRA, when the United Farm Workers of America, AFL-CIO, began to steadily gain support among the

Kawano workforce. To forestall union organization, the employer switched to a workforce composed almost entirely of undocumented workers. (*Kawano, Inc., supra,* 4 ALRB No. 104, pp. 10–11; see also *Ukegawa Brothers, supra,* 8 ALRB No. 90, ALJ Decision, pp. 146–151.)

This Court recognized in *De Canas* that employment of undocumented workers under depressed wage scales and working conditions can diminish the effectiveness of labor unions. (*De Canas* v. *Bica, supra,* 424 U.S. 351, 357.)[13] This situation would be exacerbated if Employer's position herein were adopted—undocumented workers would be even more reluctant to engage in concerted action or union activities once deprived of the protections of the NLRA. Depriving even a portion of the workforce of those protections would be ill-advised since most legislation designed to protect the workforce and insure worker health and safety is not self-enforcing, and thus, an organized workforce may be the most effective means of enforcing such legislation.[14] Therefore, the unrestrained exploitation of undocumented workers can only serve to weaken labor standards for the entire workforce. The NLRA and the ALRA, which permit all workers to organize for their mutual aid and protection —regardless of their immigration status—are thus critical in this scheme. Extension of the protections of the NLRA to undocumented workers who seek to organize to improve their wages and working conditions will redound not only to their benefit, but to the benefit of the entire workforce.

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[13] See also, Fogel, op. cit. p. 66.
[14] Ibid.

II

PETITIONERS' CONDUCT IN CONTACTING THE INS IS NOT PROTECTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Employer contends that the NLRB and the Court of Appeals have, in effect, held that, once undocumented workers engage in protected union activities, an employer may no longer contact the INS if he suspects that he may be employing undocumented workers. From this premise, petitioners argue that the Board and the court below impermissibly restricted petitioners' First Amendment right to petition the government. Both premise and conclusion conveniently ignore the facts of this case.

Neither the Board nor the Court of Appeal has held that undocumented workers are immunized from discharge—or from an employer's notification of INS—by virtue of having engaged in protected activity. Instead, the Board found that an employer could not knowingly employ undocumented workers (and, presumably take advantage of their immigration status in setting the terms and conditions of employment), and then report those same workers to the INS when they unionize. In this case, the record establishes that Petitioners knew of their employees' immigration status months before the representation election, but chose not to report them to the INS until the day after the NLRB's regional director informed the company that he had certified the union.

(Pet.App. 68a–69a, 72a, n. 3.) The NLRB and the Court of Appeals concluded that, under these circumstances, Employers' conduct—admittedly retaliatory in motivation—amounted to a constructive discharge, in violation of section 8(a)(3) of the NLRA. (29 U.S.C. sec. 158(a)(3).)

Relying on this Court's recent opinion in *Bill Johnson's Restaurants Inc.* v. *N.L.R.B.*, ___ U.S. ___, 103 S.Ct. 2161 (1983), Petitioners now argue that they had a constitutional right to thus report their employees to the INS, regardless of motive. The Company contends that this contact with the INS is absolutely protected by the First Amendment right to petition the government. However, this Court's *Bill Johnson's Restaurants* opinion does not give employers—or anyone else—*carte blanche* to abuse governmental processes. While recognizing the right of employers to litigate meritorious claims in State courts, the Court expressly acknowledged that the right to litigate was *not* absolute. The Court carved out one exception, pointing out that "prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the Act that may be enjoined by the Board." (103 S.Ct. at 2171.) The Court analogized this "sham" exception to that created in the anti-trust context in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

Amicus ALRB contends that Petitioners' conduct herein comes within the "sham" exception created by this Court in *Bill Johnson's Restaurants*. Although there, the Court describes this exception in terms of "baseless

litigation," Amicus contends that the exception was thus narrowly construed because of the factual context presented to the Court. A finding in the instant case that Petitioners' conduct is not entitled to immunity from unfair labor practice liability would comport with this Court's decision in *California Motor Transport Co.* v. *Trucking Unlimited, supra,* and with subsequent decisions of the Courts of Appeals dealing with the sham exception to the *Noerr-Pennington* doctrine. [15]

In *California Motor Transport Co., supra,* this Court recognized that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils.' " (404 U.S. at 515.) Accordingly, the Court found that a combination of entrepreneurs to harrass and deter their competitors from free and unlimited access to the courts and/or administrative agencies would violate anti-trust laws. Other courts, in construing the sham exception, have considered whether the efforts to obtain or influence legislative, judicial, or administrative actions are "bona fide" (*Clipper Express* v. *Rocky Mountain Motor Tariff,* 674 F.2d 1252, 1262 (9th Cir. 1982) or "genuine" (*Feminist Women's Health Center* v. *Mohammad,* 586 F.2d 580 (5th Cir. 1978).) In *Ernest W. Hahn, Inc.* v. *Codding,* 615 F.2d 830, 837, n. 8

[15] *Eastern Rail. Pres. Conf.* v. *Noerr Motor Freight Inc.* 365 U.S. 127 (1961) and *United Mine Workers* v. *Pennington* 381 U.S. 657 (1965) together recognize a First Amendment exception to anti-trust liability which might otherwise arise from the joint action of competitors to obtain governmental action favorable to their interests. This Court was willing to extend the protection of the First Amendment, even if the end result and the motive for the joint action were anti-competitive.

(1980), the Ninth Circuit recognized that "There is no precise definition to the sham exception. . . . The easiest way to explain it is by saying the *Noerr-Pennington* doctrine does not exempt attempts to influence the government which are a sham."

Viewed in light of these standards, Petitioners' conduct must be held to be unprotected, because it indeed is a sham. Petitioners' purpose in contacting the INS was neither an effort to assist that agency in enforcing immigration laws, nor an expression of any *bona fide* desire to see immigration laws enforced. If that were the case, Employer would have notified the INS when it first suspected that its employees were undocumented. Instead, the Company sought to utilize the INS to accomplish its own illegal end, viz., to rid itself of a pro-union workforce. The fact that their hapless employees were, in fact, undocumented does not make Petitioners' report to the INS either "bona fide" or "genuine." [16] The focus

[16] In *Bill Johnson's Restaurants*, this Court held that if plaintiff prevails in a State court action, the NLRB cannot find an unfair labor practice based on the same conduct. That analysis fails to make allowance for either employer or union abuse of process. The tort of abuse of process recognizes that even successful litigation is not necessarily constitutionally protected. In *Alexander* v. *Unification Church of America*, 634 F.2d 673, 677 (2d Cir. 1980), the court pointed out that the thrust of the tort of abuse of process "is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish." (See also *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.* 694 F.2d 466, 471–472 (7th Cir. 1982) [Existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation . . .]; see also Prosser, *Handbook of The Law of Torts* (4th Ed. 1971), 856 ["[I]n an action for abuse of process it is unnecessary for the plaintiff to prove that the proceeding has terminated in his favor."]

for analysis is neither the immigration status of Petitioners' employees nor, as Employer correctly points out, Petitioners' motive in contacting the INS. Rather, what must be examined is the manner in which Petitioners used the administrative process. The *Noerr-Pennington* doctrine and this Court's *Bill Johnson's Restaurants* analysis are premised upon a legitimate use of the political, judicial, or administrative processes, even though the motive and, indeed, the effect of that use, may be either anti-competitive or coercive. Petitioners' contact with the INS can hardly be described as a legitimate use of that agency's processes.

In *Bill Johnson's Restaurants, supra,* the Court was concerned with safeguarding the employer's access to the courts as a means of redressing alleged wrongs. (103 S.Ct. at 217). The Court pointed out that, if the NLRB enjoined prosecution of a well-grounded, non-preempted lawsuit, the State plaintiff would be deprived of a remedy for an actual injury. Thus, given the employer's First Amendment right of access to the courts to redress such injuries and the State's interest "in protecting the health and well-being of its citizens," (103 S.Ct. at 2171), the Court concluded that the NLRB could not enjoin prosecution of a unpreempted State action solely because it might be retaliatorily motivated. In the instant case, however, the *only* "wrong" Petitioners sought to redress was the unionization of its workforce. Furthermore, although it has an interest in the health and well-being of the American people, the federal government has no interest in permitting an employer to knowingly

employ undocumented workers and then report those workers to the INS if they have the temerity to engage in activity protected by the NLRA. Employers' actions herein are unprotected by the First Amendment, not because they were retaliatorily motivated, but because of the particular factual circumstances of this case, i.e., Employer's continued knowing employment of undocumented workers *and* the company's report to INS only after notification from the NLRB that a union had been certified to represent its workers.

CONCLUSION

Petitioners' argument rests on the assumption that the policies embodied in the INA are in conflict with and prevail over those policies informing the NLRA; however, such is not necessarily the case. The national concerns addressed by the two acts can—and should—stand on an equal footing; they represent Congressional responses to two very different problems. As the foregoing discussion demonstrates, there is no conflict between the NLRB's remedies and national immigration policies. But even assuming, arguendo, that such conflict did exist, the reinstatement and backpay orders in this case represent only a minimal intrusion into the INS's responsibilities for controlling entry into the United States and conditions for naturalization.

Furthermore, this case presents compelling policy reasons for upholding the Board's remedies. With a sanctimonious appeal to the First Amendment, Petitioners are effectively urging this Court to legitimize unscrupu-

lous employer conduct. Employer utterly ignored federal immigration policy when to do so served its self-interest, but now invokes that same policy—under the imprimatur of the Constitution—since the locus of its self-interest has changed. It was to Petitioners' benefit to employ undocumented workers—until they voted for a union.

Amicus Agricultural Labor Relations Board is concerned with guaranteeing to all California farmworkers the protections of the Agricultural Labor Relations Act, California's counterpart to the National Labor Relations Act. In order to do so, Amicus—like the NLRB—must be permitted to remedy the commission of unfair labor practices against employees without regard to the immigration status of those employees. Accordingly, Amicus respectfully urges this Court to affirm the decision of the Court of Appeals.

DATED:

Respectfully submitted,

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